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Background

Also being prepared is petition for writ of certiorari to United States Court of Appeals for the District of Columbia Circuit in 75-1057. December 11, 1974, dismissal of United States District Court for the District of Columbia in 74-654, Conley v. Hampton, et al, was affirmed on February 9, 1976.

Attached to this Appeal is Treasurer of the United States Check No. 4,799,315 dated AUG -2 1973 in the amount of $12,023.49 representing fraudulent annuity from October 1966 to reinstatement in 1971, CSA-1 002 105, based on information contrary to medical clearances on file at Department of State and Bethesda Naval Hospital.

Also attached to this Appeal was Check No. 35,720,929 dated 11/06/70 for $429.29 STATE DEPARTMENT SALARY for refund of money remitted by petitioner December 12, 1966, while on Leave Without Pay, as requested by Department of State for alleged overpayment of salary.

Government's defense of barring claim by statute of limitations and doctrine of laches is not valid. Petitioner asserted rights as best she knew, and statute of limitations could not begin to run until January 4, 1971, when Civil Service Commission issued Notice of Recovery from Disability based on Dr. James J. Cavanagh's statement of November 12, 1970, confirming that he had not since 1966 seen any disability!

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No._____

LENA ROSA K. CONLEY,
Petitioner

v.

RAYMOND L. ECK, M.D., Chief, Medical Division, Bureau of Retirement, Insurance and Occupational Health, Civil Service Commission; CLARICE F. HENS, Legal Counsel, Office of Civilian Manpower Management, Department of the Navy; SAM J. ERVIN, JR., Chairman, Committee on the Judiciary, Subcommittee on Constitutional Rights, U. S. Senate; and the UNITED STATES, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Lena Rosa K. Conley, prays for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit made on December 18, 1975.

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OPINIONS BELOW

The District Court on February 3, 1975, sustained defendant's motion to dismiss in CA-74-236-N, Appendix A-1; sustained defendant's motions to dismiss and granted Summary Judgment in CA-74-432-N, Appendix A-2; and granted defendants' motion to dismiss in CA-74-450-N, Appendix A-3.

The District Court's Memorandum Opinion and Order appears as Appendix A-4 through A-17, dated February 3, 1975.

JURISDICTION

The Court of Appeals affirmed judgment on November 12, 1975, Appendix A-18, A-19 and A-20.

Timely petitions for rehearing were denied December 18, 1975, Appendix A-21, A-22 and A-23.

Motion for extension of time within which to file petition for writ of certiorari was filed February 6, 1976, Appendix A-24 and A-25. Letter of February 6, 1976, stated timely filing included March 17, 1976, Appendix A-26.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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QUESTIONS PRESENTED

1. Whether immunity justifies the illegal, immoral, unethical broadcast of false information, such as that in letter of March 11, 1974, by Raymond L. Eck, MD, Chief, Medical Division, Bureau of Retirement, Insurance, and Occupational Health, United States Civil Service Commission, Washington, D. C. 20415?

2. Whether immunity should protect departure from important procedural rights, misconstruction of governing legislation, and like errors going to the heart of administrative decisions, evidenced by letter of July 31, 1974, from Clarice F. Hens, Legal Counsel, Office of Civilian Manpower Management, Department of the Navy, Washington, D. C. 20390, enclosure (11) of which was not provided petitioner until transmitted by letter of April 8, 1975, by the Assistant United States Attorney, J. Brian Donnelly?

3. Whether 5 U.S.C. § 8347(c) actually precludes judicial review according to Judge Skelton's dissent at page 302, Scroggins v. U.S., 397 F.2d 295, or whether it is repugnant to the Constitution by denying due process and requires Congressional change?

4. Has the immunity doctrine been extended too far? Note 9, page 353, Chafin v. Pratt, 358 F.2d 349 (1966).

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CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 2 of the United States Constitution: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States...or which shall be made...."

Fourth Amendment of the United States Constitution: "The right of the people to be secure. . ."

Fifth Amendment: "... nor shall any person . . be deprived of life, liberty, or property, without due process of law..."

Fourteenth Amendment: . ". . nor deny to any person . . the equal protection of the laws."

28 U.S.C. 1254 . . Cases in the courts of appeals may be reviewed by the Supreme Court . . (1) By writ of certiorari granted upon the petition of any party to any civil . . case. ."

5 U.S.C. § 8347(c). . "The decisions of the Commission concerning these matters are final and conclusive and are not subject to review."

5 U.S.C. 702: Right of review. A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

STATEMENT OF THE CASE

Petitioner has consistently refused to accept a pension for an alleged disability that never existed and continues to persuade the Government to follow the essentials of fair procedure:

To provide an ascertainable standard of conduct and clearly define the "unemployability" referred to by Judge Nichols in McGlasson v. United States, 397 F.2d 303 (1968) at page 310; or

To permit the choice of resignation with a clear record without the "badge of infamy" which Judge Skelton agrees can never be outgrown nor overcome, in Scroggins v. United States, 397 F.2d 295 (1968) at page 302.

Petitioner was cleared of any hint of disability from a psychiatric standpoint upon her return from Jidda, Saudi Arabia, and discharge to work at the Department of State by Bethesda Naval Hospital on April 22, 1965.

That the Civil Service Commission should have employed a psychiatrist on November 9, 1966, to report that petitioner was totally disabled as of October 1964 by virtue of a condition unnoticed by the Bethesda Naval Hospital for a position she never held (GS-8, Secretary) was a clear abuse of discretion and violation of individual Constitutional rights.

Equal justice under the law has been denied petitioner at every stage of the proceedings.

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REASONS TO GRANT CERTIORARI

Petitioner sincerely believes this "appeal unto Caesar" is appropriate and is grateful to live under a system where it is possible.

Petitioner has filed a number of suits in her stumbling efforts to seek justice and regrets any confusion this might cause.

Her problem with reinstatement, when she was promised permanent career status and then was not even given the protection of "probationary" status but limited "temporary" status without life insurance or retirement credit, instead, conflicts with CSC Comment on page 195 of Legislative Oversight Review of the Civil Service Commission, Hearings before the Subcommittee on Investigations of the Committee on Post Office and Civil Service, House of Representatives, 92nd Congress, 2d Session, Serial No. 92-54:

that "The Commission's regulations clearly provide that appellants and their representatives shall be assured freedom from restraint, interference, coercion, discrimination or reprisal. Mechanisms now exist for individuals who believe they have been coerced, retaliated against, or the subject of reprisal to obtain redress. . ."

Petitioner was assured she could resign with a clear record but found on reviewing her file two months later that

a derogatory remark was on her resignation. F.P.M. Supplement S1-1a(3) provides "if the agency uses deception, duress, time pressure, or intimidation to force him to choose a particular course of action, the action is involuntary."

Twice the Commanding Officer, Naval Supply Center, assured petitioner there was nothing derogatory in her file, but the administrative record forwarded on April 8, 1975, to her by J. Brian Donnelly, Assistant United States Attorney, contained half a dozen unfavorable remarks; she was refused access to this prior to the Court hearing. Such statements, without prior notice, are illegal and patently false in view of the Performance Rating Board of Review's conclusion of August 7, 1973,

"To sum up, the Board found the appellant's performance to be 'Satisfactory' in the factors of 'Quantity of Work,' 'Quality of Work,' and 'Adaptability.' This justifies an overall rating of Satisfactory under the applicable system. The Board unanimously and readily agrees that, under the totality of the circumstances, the appellant stood high in that category."

CONCLUSION

The petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

Lena Rosa K. Conley, pro se.

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CERTIFICATE OF SERVICE

I hereby certify that three printed copies of the Petition for a Writ of Certiorari were deposited in the United States mails, first class, to:

Raymond L. Eck, M.D., Chief, Medical Division, Bureau of Retirement, Insurance, and Occupational Health, United States Civil Service Commission, Washington, D. C. 20415.

Clarice F. Hens, Legal Counsel, Office of Civilian Manpower Management, Department of the Navy, Washington, D. C. 20390.

Solicitor General, Department of Justice, Washington, D. C. 20530 (for Sam J. Ervin, Jr., United States Senate, and Thaddeus J. Dulski, House of Representatives).

Roger T. Williams, Assistant United States Attorney, Post Office Box 60, Norfolk, Virginia 23501.

Lena Rosa K. Conley,
pro se.

March 15, 1976.

APPENDIX

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JUDGMENT ON DECISION BY THE COURT
CIV 32 (7-63)

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action File No. 74-236-N

LENA ROSA K. CONLEY, Plaintiff,
vs.
RAYMOND L. ECK, MD, Chief, Medical Division, Bureau of Retirement, Insurance, and Occupational Health, United States Civil Service Commission, Defendant.

JUDGMENT

This action came on for hearing before the Court, Honorable RICHARD B. KELLAM, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that the defendant's motion to dismiss is sustained.

Dated at Norfolk, Virginia, this 3rd day of February, 1975.

W. FARLEY POWERS, JR.
Clerk of Court

/s/ Jean C. Basnight
Deputy Clerk

A TRUE COPY, TESTE:
W. Farley Powers, Jr., Clerk
By /s/ Jean C. Basnight
Deputy Clerk

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JUDGMENT ON DECISION BY THE COURT
CIV 32 (7-63)

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action File No. 74-432-N

LENA ROSA K. CONLEY)
vs.)
CLARICE F. HENS, Legal Counsel) JUDGMENT
Office of Civilian Manpower)
Management Department of the)
Navy)

This action came on for hearing before the Court, Honorable Richard B. Kellam, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that the defendant's motions to dismiss and to grant Summary Judgment are sustained.

Dated at Norfolk, Virginia, this 3rd day of February, 1975.

W. FARLEY POWERS, JR.
Clerk of Court
By: /s/ Marlyn B. Whalen
Deputy Clerk

A TRUE COPY, TESTE:
W. Farley Powers, Jr., Clerk
By /s/ Marlyn B. Whalen
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA Norfolk Division

Civil Action File No. 74-450-N

LENA ROSA K. CONLEY)
vs.)
SAM J. ERVIN, Chairman, Committee) JUDG-
on the Judiciary, Subcommittee on) MENT
Constitutional Rights, United)
States Senate, et al _____)

This action came on for hearing before the Court, Honorable RICHARD B. KELLAM, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that the defendants' motion to dismiss the complaint is GRANTED; that the plaintiff take nothing, and that the action is dismissed on the merits.

Dated at Norfolk, Virginia, this 3rd day of February, 1975.

W. FARLEY POWERS, JR.
Clerk of Court
By /s/ Dorothy K. Johnson
Dorothy K. Johnson
Deputy Clerk

A TRUE COPY, TESTE
W. Farley Powers, Jr., Clerk
By /s/ Dorothy K. Johnson
Deputy Clerk

JUDGMENT ON DECISION BY THE COURT
CIV 32 (7-63)

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

LENA ROSA KNECHT CONLEY, Plaintiff,	)	CIVIL ACTION NUMBERS
v.	)	74-100-N
ROBERT E. HAMPTON, etc., et als,	)	74-236-N
	)	74-432-N
	)	74-449-N
Defendants.	)	74-450-N

MEMORANDUM OPINION AND ORDER

The plaintiff has filed numerous pro se complaints against various employees and officials of the United States government. The defendants have filed motions to dismiss in most of the cases, and a hearing was held on January 10, 1975, regarding all outstanding motions. The subject matter of each case, as well as our rulings on the various motions, will be discussed below. It appears, however, that all of the complaints arose out of the same set of facts and circumstances.

Mrs. Conley was employed as a secretary in the State Department. In October, 1966, she was placed on leave status, and in November, 1966, she underwent a psychiatric examination. As a result of this examination Mrs. Conley was declared medically unfit for future employment, and was retired on disability status. It appears that her disability was backdated to 1964, even though there was some evidence to indicate that she was mentally fit during the period of 1964-1966. See C/A 74-236-N Exhibit E

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attached to complaint. The Board of Appeals and Review upheld this decision on January 27, 1967. In 1970, Mrs. Conley was reexamined, and in January, 1971, she was declared recovered from her alleged disability and became entitled to job placement assistance. With such assistance she was employed at the Naval Supply Center (NSC) Norfolk, on July 12, 1971. Her employment was on a probationary basis, but in January, 1972, her employment at NSC was made permanent.

In April, 1972, Mrs. Conley's work was evaluated as Satisfactory, although she states that she was candidly told that her work was Outstanding but policy was not to give Outstanding ratings to workers who had been at the facility for less than one year. Mrs. Conley objected to the Satisfactory rating and refused to initial the evaluation form, but did not appeal the rating. In April, 1973, Mrs. Conley was again given a Satisfactory rating, to which she again objected. This time she appealed the rating. In June, 1973, the Local Board upheld the Satisfactory rating, and the Regional Board did likewise.

Upon returning to work in July, 1973, Mrs. Conley was dissatisfied with her work assignment and requested reassignment within the Naval Supply Center. Some differences arose, and Mrs. Conley resigned from NSC on July 13, 1973. In November, 1973, Mrs. Conley wrote to Mr. Burrell, of the Performance Rating Board in Norfolk, regarding her Satisfactory rating, and also mentioning the fact

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that she felt forced to resign. On January 31, 1974, Mrs. Conley wrote to the Commanding Officer, NSC, complaining that she felt forced to resign. The Commanding Officer responded by letter dated February 20, 1974, stating that Mrs. Conley had exhausted her administrative remedies regarding her performance rating, and that her decision to resign was voluntary and not forced upon her by officials at NSC. In a letter dated May 22, 1974, Mrs. Conley appealed to Mr. Berzak, Chairman of the Civil Service Commission's Appeals Review Board regarding both her Satisfactory rating and the fact that she was forced to resign her position at NSC. No mention is made of the actions taken by the Appeals Review Board, but we presume they were not favorable to Mrs. Conley. 1/

C/A 74-100-N and C/A 74-449-N

Read liberally, the pro se complaints in these two cases challenge the administrative determination that upheld Mrs. Conley's Satisfactory rating. The challenge is based on numerous grounds. See 5 U.S.C. § 706(2)(A), (B) and (D). Mrs. Conley feels that the administrative actions taken in upholding her Satisfactory ratings were arbitrary, capricious, and and an abuse of discretion. She further alleges that the administrative proceedings did not follow the procedures required by law. Finally, Mrs. Conley

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1/ The facts in these cases are more completely set out in the complaint in C/A 74-100-N, and in a letter attached to the complaint in C/A 74-432-N.

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alleges a denial of due process in that she did not receive a fair and impartial hearing.

The government had filed a motion to dismiss C/A 74-100-N, but at the hearing of January 10, 1075, it was agreed by all parties that the action would be heard on the administrative record. Reiterating the terms orally stated on January 10, it is ORDERED that the government will obtain a complete record of the administrative proceedings and file same with the Court by February 1, 1975, with a copy to be provided for the plaintiff. Each side will file briefs within fifteen (15) days after the record is filed, with reply briefs tc be filed within seven (7) days after the opening briefs are filed.

C/A 74-236 and C/A 74-432-N

In C/A 74-236-N, Mrs. Conley has sued Dr. Raymond L. Eck, Chief of the Medical Division, Bureau of Retirement, Insurance and Occupational Health, United States Civil Service Commission, for allegedly defamatory statements made by Dr. Eck inferring that Mrs. Conley had "a history of mental illness." It appears that Mrs. Conley contacted Mr. Stuart Katz of the Legal Assistance Office at the Norfolk Naval Base to see if Mr. Katz could help her in expunging from her records the notation that she had once been retired for a psychiatric disability. Mrs. Conley believed that this notation handicapped her in finding Federal employment. On February 27, 1974, Mr. Katz

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wrote to Mr. Robert Hampton, Commissioner of the United States Civil Service Commission, regarding this matter. The letter was referred to Dr. Eck, and he responded, concluding that "(a) history of mental illness does not disqualify a person for all Federal positions. Medically speaking, Mrs. Conley should not have any difficulty obtaining a Federal position." See Exhibit A attached to complaint in C/A 74-236-N. This is the language of which Mrs. Conley complains.

In C/A 74-432-N, Mrs. Conley has sued Clarice F. Hens, Legal Counsel in the Navy's Office of Civilian Manpower Management for alleged defamatory statements made by Ms. Hens in a letter to Mr. Berzak, Chairman of the Appeals Review Board. On July 15, 1974, Mr. Berzak requested any rebuttal argument that the Naval Supply Center might wish to offer in response to Mrs. Conley's appeal of May 22, 1974, that she was forced to resign her job at NSC. Ms. Hens, as counsel for NSC, presented their side of the argument urging that Mrs. Conley had left of her own volition. In Mrs. Conley's opinion the letter "conveyed to the reader and imputed to the plaintiff unfitness to perform the duties of an office or to perform useful and efficient service. . . ." In specific, Mrs. Conley objected to the letter containing such references as "retired for medical reasons" and "notice of recovery from disability."

The government has moved to dismiss both complaints, or in the alternative to grant summary judgment, on the ground that

the utterances made by Dr. Eck and Ms. Hens were within the outer perimeters of their respective lines of duty, and thus are protected by an absolute immunity. Barr v. Matteo, 360 U.S. 564 (1959). For the reasons given below, the Court feels that the law on the subject is so clear that we have no alternative but to sustain the government's motion and to grant summary judgment in both C/A 74-236-N and C/A 74-432-N.

In Barr v. Matteo, supra, the Acting Director of the Office of Rent Stabilization issued a press release regarding improper conduct by two of his subordinates in misusing Federal funds. The two subordinates sued, alleging that the press release was defamatory and libelous. The Acting Director defended on the ground that the statement was a privileged communication, even though it was public, because it was made within the line of duty. At the trial, the district judge refused to grant a motion to dismiss the case on the ground of absolute immunity. The Circuit Court ruled that a qualified privilege existed and the issue should go to the jury as the Acting Director could still be held liable upon a finding of malice. The Supreme Court reversed stating that as long as the utterance was made within the outer perimeter of the Assistant Director's line of duty, the utterance was absolutely privileged. Barr v. Matteo, supra at 575. Further, the mere fact that a complaint alleged malice on the part of the Assistant Director was not sufficient to destroy the privilege.

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> The fact that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable, despite the allegations of malice in the complaint. Barr v. Matteo, supra at 575.

The Supreme Court viewed the question as a balancing of interests, and resolved the question in favor of encouraging public officials to perform their duties rather than to provide a means of redress for those few who would be injured by malicious officials. Citing the often quoted passage from Judge Learned Hand's decision in Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950), the Court noted:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all

> but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation * * *" Barr v. Matteo, supra at 571-72.

This rule has been upheld even in instances where the official involved had apparently acted with malice although still within his line of duty. See Pagano v. Martin, 275 F.Supp. 498, 502 (E.D. Va. 1967), aff'd. 397 F.2d 621 (4th Cir. 1968), cert. denied, 393 U.S. 1022 (1969).

Admittedly, Mrs. Conley's suits are not against the heads of Federal agencies, but this does not nullify the application of the immunity doctrine. The immunity

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applies to every Federal employee who makes an utterance as long as it is within his line of duty. Mr. Justice Brennan, dissenting in Barr v. Matteo, supra at 587, warned against extending the immunity to every Federal employee, and stated that the opinion of the Court "seems to clothe with immunity the most obscure subforeman on an arsenal production line who has been delegated authority to hire and fire and who maliciously defames one he discharges." The intonation of his dissent has, indeed, become the rule. Thus, a Navy Captain, acting under orders from his superiors to conduct a press conference, was not liable for a slanderous remark made during the conference toward a junior officer. Berndtson v. Lewis, 465 F.2d 706 (4th Cir. 1972). Nor were officials of a defense plant liable for allegedly derogatory remarks made while testifying at a disciplinary hearing of a worker at the defense plant. Ruderer v. Meyer, 413 F.2d 175 (8th Cir.) (Blackman, C.J.), cert. denied, 396 U.S. 936 (1969). Similarly, a lawyer at a NASA Research Center was not liable for allegedly defamatory utterances when he recommended disciplinary proceedings against another official at the Center for misconduct on the job. Frommhagen v. Glazer, 442 F.2d 338 (9th Cir. 1971). Finally, department heads were not held liable for ordering a worker to submit to a psychiatric examination which resulted in the worker's being declared mentally unfit for her job. Chafin v. Pratt, 358 F.2d 349 (5th Cir.), cert. den. 385 U.S. 878 (1966).

What is important is that in each instance, no matter what the "rank" of the

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employee who made the alleged defamatory utterance, as long as it was made within the line of duty the immunity absolved him from liability. Also, it was of little consequence that the employee did not have specific authority to make the exact utterance in question. Even if the employee made the utterance in an exercise of his discretion, as long as he acted in the line of duty he was immune from suit. Berndtson v. Lewis, supra at 709, citing Denman v. White, 316 F.2d 524, 529 (1st Cir. 1963); Pagano v. Martin, supra, 275 F.Supp. at 501.

Every case presents the factual problem of whether a Federal employee was acting in the line of duty when the defamatory utterance was made. However, the Court need not conduct some form of pretrial hearing in order to determine whether certain conduct was within the line of duty. It is well decided that summary judgment may be granted based upon affidavits. Howard v. Lyons, 360 U.S. 593, 597 (1959); Chafin v. Pratt, supra at at 354; Preble v. Johnson, 275 F.2d 275, 279 (10th Cir. 1960). Counter affidavits may place before the Court sufficient facts to raise the issue of whether the utterance was truly in the line of duty. The failure to do so, however, may make summary judgment appropriate. Chafin v. Pratt, supra at 354 n. 13; Preble v. Johnson, supra at 279; F.R.Civ.P. 56(e).

In looking to the two cases in question, both Dr. Eck and Ms. Hens have filed affidavits to the effect that the letters of which Mrs. Conley complains

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were written in their respective lines of duty. Of this fact we have no doubt. Mrs. Conley has not raised a material issue of fact as to these letters not being issued in the line of duty. Mrs. Conley's pleadings allege that the letters were written wilfully, with actual malice, and with failure to exercise due care. They do not allege that they were written outside of the outer perimeters of the defendants' line of duty. The problem is not merely one of pleading, however. In the face of the defendants' affidavits, Mrs. Conley would have to file her own affidavit placing the "line of duty" question in issue. This she has not done. Now do we believe that such facts exist that could ever be marshalled in Mrs. Conley's favor. If there were, we would grant her time to file an affidavit to that effect.

Accordingly, the defendants' motion for summary judgment is hereby **GRANTED**. Mrs. Conley may not proceed with her suits against either Dr. Eck or Ms. Clarice F. Hens.

C/A 74-450-N

Mrs. Conley was found disabled for medical reasons in 1966. The Civil Service Commission's Board of Appeals and Review upheld this finding on January 27, 1967. 5 U.S.C. § 8347(c)(1967) provided (and still provides) that a decision determining disability is not subject to further review. Thus, there is no right of appeal under 5 U.S.C. § 701 et seq. Also, under 5 U.S.C. § 8347(a) the Civil

Service Commission is allowed to establish regulations for procedure during the disability hearings. See also 5 U.S.C. § 8337 (1967). These regulations limit the hearing afforded to one who is believed disabled for psychiatric reasons. See Scroggins v. United States, 397 F.2d 295 (Ct. Cl.), cert. denied, 393 U.S. 952 (1968). It is the contention of Mrs. Conley that these limitations constitute denials of her due process rights. She wrote to Senator Ervin, Chairman of the Subcommittee on Constitutional Rights, and Congressman Dulski, Chairman of the Committee on Post Office and Civil Service, but both either did nothing or expressed the opinion that they liked the present state of the law and did not want it changed. The crux of Mrs. Conley's complaint in C/A 74-450-N is that since she has suffered because of her unfair hearing and finding of disability with no right of appeal, and since Messrs. Ervin and Dulski refused to legislatively redress the wrong suffered by her, that she now has the right to recover damages from them for their inaction.

The government has moved to dismiss on the grounds that Mrs. Conley lacks standing, and that the defendants are immune from suit. We believe that while Mrs. Conley has alleged a sufficient stake in the litigation to confer standing, read Scroggins v. United States, supra at 300-302 in conjunction with Flast v. Cohen, 392 U.S. 83, 99 (1968); and Baker v. Carr, 369 U.S. 186, 204 (1962), the case must be dismissed because Ervin and Dulski enjoy an absolute immunity from

suit for actions done in the performance of their legislative duties. Doe v. McMillan, 412 U.S. 306 (1973); Gravel v. United States, 408 U.S. 606 (1972); Powell v. McCormack, 395 U.S. 486 (1969); Dombrowski v. Eastland, 387 U.S. 82 (1967); Tenney v. Brandhove, 341 U.S. 367 (1951). See also U. S. Constitution, Art. I, § 6.

The immunity that protects Ervin and Dulski is similar to that already discussed in Barr v. Matteo, supra, in that its purpose is to encourage elected representatives to discharge their public trust with firmness and determination. Tenney v. Brandhove, supra, at 373.

> It is the purpose and office of the doctrine of legislative immunity, having its roots as it does in the Speech or Debate Clause of the Constitution that legislators engaged in the sphere of legitimate legislative activity should be protected not only from the consequences of litigation's results but also from the burden of defending themselves. Dombrowski v. Eastland, supra at 84-85 (Citations omitted, emphasis added).

It is clear to us that as long as the acts complained of were within the sphere of legitimate legislative activity, then Ervin and Dulski are protected from ever having to defend themselves in a court of law. See also Powell v. McCormack, 395 U.S. 486, 502-03 (1969). Further, the fact that Ervin and Dulski may have had an unworthy motive behind their legislative

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actions does not diminish the protection of the legislative immunity. Tenney v. Brandhove, supra, at 377.

Examining the facts in a light most favorable to Mrs. Conley, clearly, the decision by Ervin and Dulski not to support the legislation suggested by Mrs. Conley goes to the very heart of the "legitimate legislative activity" protected by the doctrine of legislative immunity. Since Mrs. Conley has not sued any persons who may have been involved in a capacity not protected by the immunity doctrine, see Powell v. McCormack, supra; and Dombrowski v. Eastland, supra, there is no possible issue of fact remaining to be resolved.

Accordingly, the government's motion to dismiss the complaint in C/A 74-450-N is hereby GRANTED.

/s/ Richard B. Kellam

United States District Judge

Norfolk, Virginia

February 3rd, 1975.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1303

Lena Rosa K. Conley, etc., Appellant,

-versus-

Raymond L. Eck, M. D., Chief, Medical Division, Bureau of Retirement, Insurance and Occupational Health, United States Civil Service Commission, etc., Appellee.

No. 75-1304

Lena Rosa K. Conley, etc., Appellant,

-versus-

Clarice F. Hens, Legal Counsel, Office of Civilian Manpower Management, Department of the Navy, etc., Appellee.

No. 75-1305

Lena Rosa K. Conley, etc., Appellant,

-versus-

Sam J. Ervin, Jr., Chairman, Committee on the Judiciary Sub-committee on Constitutional Rights, United States Senate, etc., and Thaddeus J. Dulski, Chairman, Committee on Post Office and Civil Service, House of Representatives, etc., Appellees.

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Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Richard B. Kellam, District Judge.

Submitted: October 22, 1975.

Decided: Nov. 12, 1975

Before RUSSELL, FIELD and WIDENER, Circuit Judges.

Lena Rosa K. Conley, Pro Se, Appellant; Roger T. Williams, Assistant United States Attorney, for Appellees.

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PER CURIAM:

Lena Rosa K. Conley filed libel actions against Clarice F. Hens, Local Counsel for the Office of Civilian Manpower Management, Department of the Navy, and against Dr. Raymond L. Eck of the United States Civil Service Commission, and an action against Senator Sam J. Ervin, Jr., and Congressman Thaddeus J. Dulski for their failure to enact legislation which she desired. As the District Court held, the actions complained of were performed by the defendants when acting within their respective lines of duty and are thus immune from suit with regard to those actions. Barr v. Matteo (1959) 360 U. S. 564.

Accordingly, the judgments appealed from are affirmed for the reasons stated by the District Court.

Conley v. Hampton, C/A 74-432-N, C/A 74-236-N, C/A 74-450-N (E.D.Va. 1975).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

F I L E D
DEC 18 1975
WILLIAM K. SLATE, II
CLERK

No. 75-1303

Lena Rosa K. Conley, Appellant,

-versus-

Raymond L. Eck, M. D., etc. et al., Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk.

O R D E R

Upon consideration of the petition for rehearing, and with the concurrence and approval of the other members of the panel,

IT IS ORDERED AND ADJUDGED, That the petition for rehearing is denied.

For the Court:

/s/ Russell
United States Circuit Judge

A True Copy, T e s t e:
William K. Slate, II, Clerk
By /s/ Virginia Lipford
Deputy Clerk

POOR COPY

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

F I L E D
DEC 18 1975
WILLIAM K. SLATE, II
CLERK

No. 75-1304

Lena Rosa K. Conley, etc., Appellant,

-versus-

Clarice F. Hens, Legal Counsel, etc., Appellee.

No. 75-1305

Lena Rosa K. Conley, etc., Appellant,

-versus-

Sam J. Ervin, J., Chairman, etc., et al., Appellees.

Appeals from the United States District Court for the Eastern District of Virginia, at Norfolk.

O R D E R

Upon consideration of appellant's motion to enlarge the time for filing a petition for rehearing,

IT IS HEREBY ORDERED, with the concurrence of Judge Field and Judge Widener, the other members of the panel, that the motion be granted; and

Upon consideration of appellant's petition for rehearing, and with the concurrence and approval of the panel,

IT IS ORDERED AND ADJUDGED, That the petition for rehearing is denied.

For the Court:

/s/ Russell

United States Circuit Judge

A True Copy, T e s t e:

William K. Slate, II, Clerk

/s/ Virginia Lipford
Deputy Clerk

UNITED STATES
COURT OF APPEALS
FOR THE FOURTH CIRCUIT

POOR COPY

IN THE SUPREME COURT OF THE UNITED STATES

LENA ROSA K. CONLEY, Petitioner,

v.

RAYMOND L. ECK, M. D., Chief, Medical Division, BRIOH, UNITED STATES Civil Service Commission, etc., No. 75-1303 (CA-74-236-N)

CLARICE F. HENS, Legal Counsel, OCMM, Department of the Navy, etc., No. 75-1304 (CA-74-432-N)

SAM J. ERVIN, JR., Chairman, Committee on the Judiciary, Sub-committee on Constitutional Rights, UNITED STATES Senate, etc., No. 75-1305 (CA-74-450-N)

MOTION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner respectfully requests an extension of time not exceeding sixty days (Rules 13 and 34(2)) to docket appeal of above due to following extraordinary circumstances:

ON JANUARY 9, 1976, about 10:10 p.m., as petitioner was bending to unlock her door, her purse was grabbed and she was dragged off her porch down five steps to pavement, suffering not only loss of purse with money, identifications, driver's permit, etc., but also cut (Laceration) over left eye, broken left shoulder bone,

bruised upper left arm muscle, and fractured right wrist. Cast on right arm scheduled for removal February 9, but may not mean full use of right hand then. This is being painfully typed with left hand; petitioner had not anticipated such continued weakness.

Decision on above November 12, 1975; certified copies of orders filed December 18, 1975. Petitioner wrote December 19 for information how to petition for writ of certiorari. Receiving no response, Petitioner took Greyhound to D.C. and was provided on January 27, 1976, RULES OF THE SUPREME COURT and sample petition.

WHEREFORE, Petitioner respectfully requests that the time within which she may docket appeal be extended.

/s/ Lena Rosa K. Conley
LENA ROSA K. CONLEY PRO SE.

CERTIFICATE OF SERVICE: I HEREBY CERTIFY that a copy of the foregoing Motion has been sent to the Solicitor General, Department of Justice, Washington, D. C. 20530.

/s/ Lena Rosa K. Conley
LENA ROSA K. CONLEY, pro se.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

February 6, 1976

Ms. Lena K. Conley
300 W. 35th Street
Norfolk, Virginia 23508

RE: LENA ROSA K. CONLEY v. RAYMOND L. ECK, M.D., ETC.

Dear Ms. Conley:

Your application for an extension of time in which to file a p tition for a writ of certiorari received February 6, 1976, is herewith returned inasmuch as it was received prematurely.

Please be advised that one has ninety days from the date of denial of a petition for rehearing to file a petition for a writ of certiorari. Inasmuch as the Court of Appeals has confirmed that your petition for rehearing was denied December 18, 1975, a petition for a writ of certiorari would be timely filed on March 17, 1976.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By /s/ Francis J. Lorson

Francis J. Lorson,
Deputy Clerk

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Enclosure

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1324

LENA ROSA K. CONLEY, PETITIONER

v.

DR. RAYMOND L. ECK, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner, a former federal employee, seeks review of the court of appeals' decisions affirming the dismissal of a series of actions she had brought against the following persons:

(1) Dr. Raymond L. Eck, Chief of the Medical Division, Bureau of Retirement, Insurance, and Occupational Health, United States Civil Service Commission;

(2) Clarice F. Hens, Legal Counsel in the Navy's Office of Civilian Manpower Management;

(3) Senator Sam Ervin, former Chairman of the Committee on the Judiciary, Subcommittee on Constitutional Rights; and

(4) Representative Thaddeus Dulski, Chairman of the Committee on the Post Office.

All of the suits apparently arose out of an effort by petitioner to have a "satisfactory" performance rating raised to an "outstanding" rating, to show that her resignation was forced rather than voluntary, and to have reference to a former psychiatric disability expunged from her record (Pet. App. A-4 to A-7).

Petitioner's suit against Dr. Eck was for libel based on his reply to an inquiry by her attorney concerning her medical record. Petitioner considered libelous the doctor's reply that "[a] history of mental illness does not disqualify a person from all Federal positions. Medically speaking, Mrs. Conley should not have any difficulty obtaining a Federal position" (Pet. App. A-8).

Petitioner's suit against Ms. Hens stems from a letter written by Ms. Hens, as counsel for the Navy, to the Chairman of the Civil Service Commission's Appeals Review Board, in response to a request for the Navy's views on petitioner's claim that she had been forced to resign (Pet. App. A-8). Petitioner objected to two references in the letter to her former psychiatric disability (*ibid.*).

Petitioner's suit against Senator Ervin and Representative Dulski alleges that she suffered wrong due to Congress' failure to amend 5 U.S.C. 8347(c), which provides that a decision determining disability is not subject to further review (Pet. App. A-14, A-15).

The district court granted defendants' motions for summary judgment in the first two actions, relying on *Barr* v. *Matteo,* 360 U.S. 564, and granted defendants' motion to dismiss in the third suit relying, *inter alia,* on *Tenny* v. *Brandhove,* 341 U.S. 367 (Pet. App. A-14 to A-16). The court of appeals affirmed, on the ground that the defendants were all public officials who had acted within their respective lines of authority and who

were therefore immune from suit under *Barr* v. *Matteo, supra* (Pet. App. A-20).

The decision below is correct. Read in the light of *Wood* v. *Strickland,* 420 U.S. 308, and *Scheuer* v. *Rhodes,* 416 U.S. 232, at a minimum *Barr* still stands for the proposition that public officials are immune from libel actions premised upon statements made by them in good faith and without malice in the course of their official duties. There was no genuine issue here concerning the good faith or nonmaliciousness of the respondents Eck and Hens who, within the course of their official duties, did no more than to refer to petitioner's medical record. The district court thus properly granted the motions for summary judgments.

Petitioner's complaint against Senator Ervin and Representative Dulski plainly failed to state a cause of action. A legislator's refusal to seek amendment of a statute is not actionable. The district court thus properly dismissed petitioners complaint against the members of Congress.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1976.